LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
DEC 1 1949
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM—1949.

No. 150 150

ALBERT G. DICKINSON,

Appellant,

against

PETROLEUM CONVERSION CORPORATION,

Respondent.

RESPONDENT'S SUPPLEMENTAL BRIEF.

ALEXANDER KAHAN,
Attorney for Petroleum Conversion Corporation, Bankrupt, Respondent,
60 Broad Street,
New York, N. Y.

INDEX.

PAGE

POINT I.—The Decree of April 10, 1947 was interlocutory. It was neither final nor complete, and hence not appealable. The appeal taken from the final decree of August 3, 1948 automatically included an appeal from the earlier decree of April 10, 1947 1

POINT II.—There was no consent, actual or implied, to the entry of the Interlocutory Decree of April 10, 1947, so as to preclude the appeal of the Petroleum Conversion Corporation 9

CONCLUSION 11

Table of Cases.

	PAGE
Cobbledick v. *United States*, 309 U. S. (decided February 26, 1940)	5
Cohen v. *Beneficial Industrial Loan Corporation* (decided June 20, 1949)	7
Clark v. *Taylor*, 163 F. 2nd 940 (as revised October 15, 1947)	6
Collins v. *Miller*, 252 U. S. 366 (decided March 29, 1920)	6
Petrol Corporation v. *Petroleum Heat & Power*, 162 F. 2nd 327	5
Wheeler v. *Harris*, 13 Wall. 51	4
McGourkey v. *Toledo & Ohio Central*, 146 U. S. 536	2
Railroad Company v. *Swasey*, 23 Wall. 405	4
Rules of Civil Procedure:	
Rule 54(b)	4

POINT I.

The Decree of April 10, 1947 was interlocutory. It was neither final nor complete, and hence not appealable. The appeal taken from the final decree of August 3, 1948 automatically included an appeal from the earlier decree of April 10, 1947.

The within appeal comes before this court on two certified questions. The first of the questions is as follows:

> **"Where two rival claimants each sought the recovery of a particular sum from other parties to the action and judgment after trial, entered in 1947, dismissed on the merits one of said claims and granted recovery in a fixed amount to the other claimant, a spurious class, and provided for judgment apportioning said recovery to members of the class after opportunity to absent members to intervene and claim their respective shares, and all other issues in the action were disposed of by said 1947 judgment, and the unsuccessful claimant failed to appeal therefrom within the statutory period, is its receiver in bankruptcy nevertheless entitled to a review of said 1947 judgment, dismissing its claim on the merits, by an appeal from the 1948 judgment apportioning the recovery to members of the class constituting the successful claimant?"**

At the outset it should be noted that in the first of these questions presented for this court's determination, the appellant has erroneously made reference to a 1947 judgment. Careful examination of the record fails to disclose that any judgment was ever entered in this action in 1947. True it is that an interlocutory decree was entered on April 10, 1947, from which no appeal was taken, but

no judgment was directed to be nor was a judgment ever entered on this decree and it was not until after the entry of the final decree on August 3, 1948 that the only judgment in the action was entered. In fact, the interlocutory decree of April 10, 1947 specifically defers the entry of judgment (R. 29) until the determination of certain matters reserved in that decree. Exactly why the appellant chose to refer to this decree as a judgment is not entirely clear, unless it was done for the purpose of bolstering his claim that this decree was final and should have been appealed from. The first certified question, therefore, directly raises the issue as to whether the interlocutory decree of April 10, 1947 was a final judgment and consequently appealable.

The policy of this court, as well as that of most of the courts of this country, has always been to allow an appeal only from a final decree, order or judgment. Logic dictated the continuance of such a policy. To permit otherwise would bring about a multiplicity of appeals and create inordinate delays and unlimited confusion. Despite this general principle upon which most of the courts seem to agree, questions have always arisen as to what constitutes "final" and does "final" always mean "final". The treatment of this subject has usually taken the form of a statement of the rule "only a final judgment can be appealed from", followed by definitions of what constitutes a final judgment, of which one has usually had to take one's choice, depending upon the result to be reached. This court has said:

> "Probably no question of equity practice has been the subject of more frequent discussion than the finality of decrees. * * * The cases, it must be conceded, are not altogether harmonious." *McGourkey* v. *Toledo & Ohio Central*, 146 U. S. 536.

However, out of the welter of inharmonious decisions on this subject there arises what to us seems to be a clear pattern. Where a decree, order or judgment is tentative, informal or incomplete, where any matter remains open, unfinished or inconclusive, no appeal can be taken. The courts have recognized that in order for a judgment to be final and accordingly appealable, there must in addition to finality be completeness. Not only must all of the rights of the various parties be determined, but in addition all of the matters in controversy as a whole must be disposed of.

In the interlocutory decree of April 10, 1947 the court clearly recognized that it was neither final nor complete. Among other things, the court directed the holding of a hearing four months after the date of the entry of the interlocutory decree, and further directed that notice of the hearing be given, among others, to the Petroleum Conversion Corporation (fol. 37). Had it been the intention of the court to make the interlocutory decree of April 10, 1947, final as to the Petroleum Conversion Corporation, what then would have been the necessity of directing the giving of notice of the hearing to the Petroleum Conversion Corporation? It seems to us that if there was nothing else in the entire case, that fact without more, taken directly from the decree itself, completely demolishes the appellant's position that this decree was a final judgment. But we need not rest on that fact alone. If the interlocutory decree of April 10, 1947 was a final judgment and complete as to the Petroleum Conversion Corporation, the District Court would have directed the entry of a judgment disposing of Petroleum Conversion Corporation's claims and terminating the entire litigation insofar as Petroleum Conversion Corporation was concerned. The fact is, how-

ever, that the District Court did nothing of the kind. It neither completely disposed of the action, nor even all the Petroleum Conversion Corporation's claims, nor did it direct the entry of judgment thereon, but in fact reserved certain matters for future consideration, which required the giving of further notice to Petroleum Conversion Corporation.

> "A decree where a cause is held for further direction, is not a final decree, reviewable on appeal." *Railroad Company* v. *Swasey*, 23 Wall. 405.

Furthermore, the direction contained in the decree deferring the taxation of costs is merely another example of the lack of finality and completeness of the decree of April 10, 1947, which rendered it unappealable. In *Wheeler* v. *Harris*, 13 Wall. 51, this court held:

> "A decree of the Circuit Court where costs are to be taxed is not final, and an appeal from it premature. A formal decree should be entered after taxation and appeal taken from that."

Where a litigation contains claims or counterclaims of various claimants, the trial court can in some instances dispose of some of the claims with finality and completeness without disposing of all the claims. Had the court in the instant case considered it possible to do this, it would have directed the entry of judgment disposing of the numerous claims of the Petroleum Conversion Corporation in accordance with the provisions of Rule 54 (b) of the Rules of Civil Procedure of the District Courts of the United States. This procedure would have had the effect of a severance. Since no such direction was contained in the interlocutory decree of April 10, 1947 and since no judgment was so entered, it is apparent on the face of the interlocu-

tory decree itself that it was neither complete nor final, and hence not appealable. It is further apparent from the reading of the several decrees herein that the court recognized its inability to sever the action. It is equally apparent that the court had no intention of doing any such thing and appellant's strenuous efforts to characterize the court's intentions in that regard are entirely erroneous and unfounded and contrary to fact and law.

There is no question and the District Court so held that the decree of April 10, 1947 was interlocutory and, therefore, not appealable.

In the case of *Cobbledick* v. *United States*, 309 U. S. (decided February 26, 1940), Mr. Justice Frankfurter, who wrote the opinion, said at pages 324 and 325:

> "* * * Finality as a condition of review is an historic characteristic of federal appellate procedure. It was written into the first Judiciary Act and has been departed from only when observance of it would practically defeat the right to any review at all. Since the right to a judgment from more than one court is a matter of grace and not a necessary ingredient of justice, Congress from the very beginning has, by forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration. * * *"

The theory underlying the entire question of appealability of orders, is that the "transaction" or "occurrence" is the subject matter of a claim or claims rather than the legal rights arising therefrom. Additions to or subtractions from the central core of facts do not change the substantial identity of the "transaction" or "occurrence" so as to support piecemeal appeals. *Petrol Corporation* v. *Petroleum Heat & Power*, 162 F. 2nd, 327.

So we find in the instant case that the District Court's decision and its interlocutory decree of April 10, 1947, dismissing the claim of the Petroleum Conversion Corporation, did not meet the test established by rule and decision for finality and completeness, because while some of the rights and claims of the Petroleum Conversion Corporation might have been disposed of in the court's decision, the "transaction" or "occurrence" of all the causes of action, was not disposed of. To like effect we find that in the case of *Collins* v. *Miller*, 252 U. S. 366 (decided March 29, 1920), Mr. Justice Brandeis, who delivered the opinion of the court, said at page 370:

> "* * * and the rule requires that the judgment to be appealable should be final not only as to all the parties, but as to the whole subject matter and as to all of the causes of action involved. * * *"

The United States Court of Appeals for the Second Circuit, in denying the motion to dismiss respondent's appeal, clearly recognized this principle. While it agreed that some of the claims of Petroleum Conversion Corporation were disposed of in the interlocutory decree of April 10, 1947, it did not recognize that there was any distinction between the instant case and the case of *Clark* v. *Taylor*, 163 F. 2nd 940 (as revised October 15, 1947), previously decided by that court. In an exhaustive analysis the court pointed out that in reaching its decision in *Clark* v. *Taylor*, *supra*, it regarded the "transaction", the "occurrence" as a whole, as the controversy and not the series of mutual rights and liabilities which had arisen out of it; and it accordingly held that until all of these rights and liabilities had been determined, no appeal could be taken, however finally any particular right or liability might have been disposed of. Furthermore, they recognized that in cases

where "transactions" or "occurrences" wholly disconnected were coupled, separate appeals might be taken, but found that no such situation existed in the instant case.

The interlocutory decree of April 10, 1947 was but an incident in the litigation and was merely a step towards the final decree and judgment which were entered on August 3, 1948, and from which final decree and judgment the respondent's appeal was taken.

In the case of *Cohen* v. *Beneficial Industrial Loan Corporation* (decided June 20, 1949), Mr. Justice Jackson delivered the opinion of the court, and said at page 1225:

> "* * * So long as the matter remains open, unfinished or inconclusive, there may be no intrusion by appeal. * * *"

and again at page 1226:

> "Nor does the statute permit appeals even from fully consummate decisions, where they are but steps toward final judgment in which they will merge. The purpose is to combine in one review all stages of the proceeding that effectively may be reviewed and corrected if and when final judgment results. * * *"

To summarize, we find that the decree of April 10, 1947 was not a judgment, was not final, was not complete, was but an incident in the litigation and merely a step to the final judgment, and was solely and only for all purposes an interlocutory decree, and that the trial court intended and regarded it as such.

The entire litigation from its very inception, through to the final decree and judgment of August 3, 1948, entirely revolved around, with or against Petroleum Conversion Corporation. How then, could it be urged in any sense that the interlocutory decree of April 10, 1947 was a final judgment against Petroleum Conversion Corporation.

POINT II.

There was no consent, actual or implied, to the entry of the Interlocutory Decree of April 10, 1947, so as to preclude the appeal of the Petroleum Conversion Corporation.

The second of the two questions before this court is as follows:

> "Where a corporation intervenes in an action and pleads a claim against the plaintiff and one of the defendants for a particular sum of money based upon breach of fiduciary obligation and representatives of subscribers to the stock of said corporation simultaneously intervene and assert a claim for the same amount on behalf of the class on ground that the sum sought came out of funds belonging to said class, alleging, however, that either said class or the corporation was entitled to the recovery, and the action is tried on behalf of both the corporation and the class by a single counsel, the attorney for the corporation, and at the end of the trial both submitted a single brief and a single set of proposed findings and conclusions of law, both leaving it to the trial court to decide whether, if a recovery was to he had, to which of said claimants it should be awarded, and the decree, dismissing the claim of the corporation on the merits and sustaining the claim of the class and fixing the total recovery thereon, was entered on the joint motion of the attorney for the corporation and the attorney for the class, and the attorney for the class was an officer of and an attorney for the corporation, should the Court of Appeals have dismissed the appeal seeking review of said decree on behalf of the corporation by its receiver in bankruptcy, on the ground that the decree was a consent decree, it appearing that both the

corporation and the class had asserted and prosecuted their claims and jointly entered said decree on the basis that it was satisfactory to both if either recovered?"

We find that in the second of the two questions certified for determination by this court, the appellant has confused facts with inferences from facts. It has suited the purposes of the appellant to infer from certain facts that the Petroleum Conversion Corporation consented to the entry of the interlocutory decree of April 10, 1947, and now he would have it appear in wording and presenting the second question that these inferences are facts rather than his deduction from facts. Let us examine the facts.

It should be noted at this point that none of these facts appear in the record before this court, but inasmuch as the question has been presented by the appellant, it is incumbent upon us to answer it. The appellant points out that the decree of April 10, 1947 was entered on the joint motion of the attorney for the Petroleum Conversion Corporation and the attorney for the Rinke Agency Subscribers. That because the attorney for the Rinke Agency Subscribers was also an officer and attorney for the Petroleum Conversion Corporation, that this incident indicated that the Rinke Agency Subscribers and the Petroleum Conversion Corporation had identical interests, and that whether one or the other was successful was of no moment. Nothing could be further from the true situation. The interests of the Rinke Agency Subscribers and of the Petroleum Conversion Corporation were never identical. They were in fact in complete conflict. That the attorneys who represented the Rinke Agency Subscribers and the Petroleum Conversion Corporation did not recognize this fact does not change the ultimate and basic situation.

The fact that the attorney for the Petroleum Conversion Corporation improperly joined in the entry of the decree and the fact that the attorney for the Rinke Agency Subscribers was an officer and attorney of the Petroleum Conversion Corporation does not of itself make the interlocutory decree of April 10, 1947 a consent decree, and hence not appealable.

For a decree to be entered on consent there must be actual consent endorsed thereon and appearing on the face thereof. Nothing contained in the records indicates that there is or ever was such actual consent. It is conceivable that in many instances a decree or order or judgment may be entered upon the motion of a party who subsequently appeals from the very decree, order or judgment which he was responsible for having entered. Circumstances such as the failure of other parties in a litigation to enter a decree, judgment or order may compel such entry of judgment by a party who wishes to appeal without delay. The fact of the entry of judgment by such party does not thereafter preclude his appeal on the ground that the entry on his motion constitutes a consent. Nor can any consent be inferred from any of the other stated facts in the petition. As has been pointed out, consent to the entry of a judgment, decree or order must be actual and must appear on the face of the decree, judgment or order, to be effective as a consent.

Since there was no actual consent appearing either in the record of the trial, the interlocutory or final decrees or the judgment entered thereunder, there could be no effective bar to the appeal by Petroleum Conversion Corporation from the only judgment in the action entered on August 3, 1948. Furthermore, respondent is somewhat at a loss to understand how this entire question of consent incorporated by the appellant in his question number 2 and certified for review on this appeal, is germane to the issues involved. If

as the appellant contends the decree of April 10, 1947 was final as to this respondent, even if there had been consent, the question is rendered academic, because the time to appeal from such judgment had expired long before the service of a Notice of Appeal in behalf of Petroleum Conversion Corporation. Certainly if the respondent is correct in its contention that the decree of April 10, 1947 was interlocutory only, even if the respondent had consented to the entry of such interlocutory decree the respondent would not have been precluded from taking an appeal from the final decree and judgment entered on August 3, 1948, which it did.

The within brief is intended to be supplemental to respondent's brief heretofore filed in this court in opposition to appellant's application for Writ of Certiorari.

Conclusion.

The order of the Circuit Court of Appeals for the Second Circuit, denying appellant's motion to dismiss respondent's appeal, should be affirmed.

Respectfully submitted,

ALEXANDER KAHAN,
Attorney for Petroleum Conversion
Corporation, Bankrupt, Respondent.